No. 84-252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANN SHAVERS,
Petitioner,

v.

WALTER E. HELLER & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the finality of a judgment properly entered in accordance with Rule 54(b), Fed.R.Civ.P. when the judgment itself was not appealed, but an appeal of an order denying relief under Rule 60(b), Fed.R.Civ.P. was prosecuted instead, and when the issue of finality was neither presented to the trial court nor adjudicated by the court of appeals?

2. In the alternative, if this Court has jurisdiction to consider the finality of the judgment underlying the Rule 60(b) order, does the fact that there are multiple defendants in the original suit vitiate the finality of the judgment against Petitioner when the proven allegations against her provide a basis for individual, as well as joint, liability?

PARTIES TO THE PROCEEDINGS

The only parties to the judgment of which review is sought are the parties named in the caption to the petition in this Court. The additional parties named by Petitioner are other defendants to the original suit filed in the district court, but are not parties to any judgment which may now be before this Court.

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JURISDICTION OF THIS COURT

Although Petitioner claims that jurisdiction is vested in this Court under 28 U.S.C. § 1254(l) to review the actions of the district court and the court of appeals, including the finality of the district court's judgment, Respondent contends that this Court does not have jurisdiction to review the questions presented by Petitioner, as those issues are not, and have never been, properly "in" the court of appeals, as required by 28 U.S.C. § 1254. Nevertheless, should the Court determine it does have jurisdiction, Respondent will also show that Petitioner's arguments herein are without merit.

STATEMENT OF THE CASE

On July 1, 1983, the U. S. District Court for the Northern District of Texas entered a final judgment against the Peti-

tioner. Upon Respondent's request, the clerk had entered a default against Petitioner on June 10, 1983 after she had failed to answer or to make any appearance in response to service of Respondent's First Amended Complaint which named her as a defendant. Judgment was certified as final pursuant to Rule 54(b), Fed.R.Civ.P., the court having found no just reason for delay and expressly directing entry of the judgment. Indeed, the district court explicitly stated it perceived a probable danger that Petitioner "would conceal, waste or otherwise dispose of assets available to satisfy Plaintiff's claims, and that Plaintiff would suffer prejudice from the delay of entry of final judgment." A copy of the judgment was mailed to Petitioner on July 1, 1983 by certified mail but she did not accept delivery until July 15, 1983. Thus, she had at least 15 days in which to notice an appeal of the judgment, which she failed to do. (Petitioner's Appendix D.)

Rather than appeal, Petitioner chose to file an Answer in the district court on July 26, 1983, some six days before the time to appeal expired. Then, on August 3, 1983, she filed a Motion to Vacate Service of Process and to Set Aside the Judgment, pursuant to Rule 60(b), Fed.R.Civ.P.[1] The district court denied the Motion, determining that Petitioner "has done business in Texas and that she has shown insufficient excuse for her failure to obey the summons of the Court." (Petitioner's Appendix C.)

The grounds stated in Petitioner's Motion to set aside the judgment purported to derive from Rule 60(b), subsections

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[1]The date of the certificate of service attached to the motion is July 29,1983. Thus, Petitioner prepared this motion within the time which would be allowed under Fed.R.App.P. 4(a)(1) to notice an appeal. Morever, she filed it within the time during which she could have sought an extension of her time for appeal, pursuant to Fed.R.App.P. 4(a)(5).

(1) (mistake, inadvertence, surprise or excusable neglect), (3) (misconduct of the adverse party), (4) (voidness of the judgment due to insufficient service of process), and (6) (that it would be generally unfair to enforce the judgment), although the subsections were not identified or discussed with any specificity. (*See* Petitioner's Appendix G.) Nowhere in her motion did Petitioner raise the issue of whether the judgment was indeed a final one, i.e., whether it should have been certified as final pursuant to Rule 54(b), which is the issue Petitioner seeks to have this Court review. Indeed, Rule 60(b), by its terms, is applicable only to final judgments.

Petitioner disputes the finality of the 54(b) judgment primarily on the ground that it would be incongruous to hold only one defendant liable in a suit alleging conspiracy. However, the Petitioner assumes inaccurately that the judgment entered against her on July 1, 1983 rests solely on acts for which there could be only joint liability. In fact, Respondent's First Amended Complaint, in which the Petitioner was joined as a defendant, alleges conduct by the Petitioner which depends in no way on the actions of the other defendants, or on a conspiracy between or among the defendants. Although the Complaint contains a conspiracy allegation, it also outlines conduct by the individual defendants which may or may not have been collusive, such as fraudulent omission and misrepresentations made to the Respondent. (*See* Petitioner's Appendix J.)

On September 15, 1983, the district court entered an order denying Petitioner's Rule 60(b) motion and she filed a timely notice of appeal of that order. In her jurisdictional statement to the court of appeals, Petitioner relied on Rule 60(b), and on 28 U.S.C. § 1291, which vests appellate jurisdiction over final judgments in the courts of appeals. The Fifth Circuit, finding no abuse of discretion by the trial

court, affirmed the district court's order denying relief (Petitioner's Appendix B), and subsequently refused to rehear the matter, en banc or otherwise. (Petitioner's Appendix A.)

Petitioner's murky presentation of the posture of this case leads her to the inaccurate conclusion that the Fifth Circuit Court of Appeals "assumed jurisdiction" of this case. The implication of the quoted language is that the court of appeals did not rightly have jurisdiction of the issue before it, viz., Rule 60(b). The fact is that a proper notice of appeal was filed by the Petitioner from the 60(b) ruling of the district court, and there can be no question that the court of appeals had jurisdiction to review the validity, under the applicable "abuse of discretion" standard, of the lower court's denial of relief. That is precisely what the court of appeals did, as its opinion makes clear. It never at any time "affirm[ed]" (Petition, pp. 6, 7, 8, 14) the judgment against the Petitioner, because it never had jurisdiction to review the judgment, no appeal from that judgment ever having been taken.

For the reasons outlined below, wherein Respondent will show that this Court does not have jurisdiction to review the questions presented by Petitioner, or, alternatively, that the judgment is a final one, Respondent respectfully requests that writ of certiorari be denied.

DISTRICT COURT JURISDICTION

In addition to the sources of the district court's jurisdiction named in the petition, jurisdiction was also vested in that court under 28 U.S.C. § 1337, for cases involving Acts of Congress regulating commerce, and 18 U.S.C. § 1964(c), the Racketeer Influenced and Corrupt Organizations Act (RICO).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review the questions presented by Petitioner. Those questions seek review of the

issue of finality of a judgment properly entered against Petitioner pursuant to Rule 54(b), Fed.R.Civ.P. Because that judgment was not appealed, however, it is not and never has been "in" the court of appeals. Thus, the question of its finality is not before this Court and is beyond review.

Petitioner seeks to circumvent her failure to appeal by coming to this Court via the collateral route of Rule 60(b), Fed.R.Civ.P. Pursuant to that Rule, she filed a motion to set aside the judgment on grounds unrelated to its finality. It was the denial of the Rule 60(b) motion which she appealed, and which the court of appeals affirmed. It is well established that the appeal of the denial of a Rule 60(b) motion does not bring up the underlying judgment for review. *Browder v. Director, Department of Corrections of Illinois*. 434 U.S. 257, 263 n.7 (1978), *reh'g den.*, 434 U.S. 1089 (1978). Moreover, even if finality could be considered in the Rule 60(b) context, grounds for relief not raised in the trial court are not preserved for review on appeal, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), nor for review by this Court, *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Rugendorf v. United States*, 376 U.S. 528, 534 (1964), *reh'g den.*, 377 U.S. 940 (1964).

Because the 54(b) judgment and its finality are not before this Court, any issue relative to the interaction between Rule 54(b) and 28 U.S.C. § 1292(b), providing for certain interlocutory appeals, is not before this Court. There was never any need for the court of appeals to take jurisdiction of Petitioner's case under the authority of § 1292(b) because the court of appeals did not undertake to review an interlocutory judgment. That court was only reviewing the unquestionably final and appealable denial of Rule 60(b) relief.

Even if this Court concludes it does have jurisdiction to review Petitioner's questions, there are other reasons

weighing against a grant of certiorari. First, the decision as to whether to certify a judgment as final is vested in the discretion of the trial court, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956), and should be afforded substantial deference. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980).

Additionally, the 54(b) judgment is a final one, ultimately disposing of claims of liability and fixing damages. The judgment is not rendered nonfinal simply because the Respondent's Complaint alleged causes of action which would support joint liability. The Complaint also alleged conduct which results in joint and several liability, so that there is nothing incongruous about enforcement of the judgment against Petitioner alone.

REASONS FOR DENYING THE WRIT

I. This Court Has No Jurisdiction to Review the Questions Presented by the Petitioner

A. The Underlying 54(b) Judgment Was Not Appealed

It is long and well-established that "a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before [it]." *Brown Shoe Co. v. United States*, 370 U.S. 294, 305-6 (1962). Such an inquiry in the instant case reveals that this Court lacks jurisdiction to consider the case as it has been presented by the Petitioner.

Petitioner has invoked jurisdiction under 28 U.S.C. § 1254, which provides that review may be had of cases which are in the courts of appeals. A case is properly "in" a court of appeals when a final judgment has been rendered by a court below and a timely notice of appeal has been filed. *United States v. Nixon*, 418 U.S. 683, 690 (1974). The only aspect of the case at bar as to which both of those require-

ments have been met is the district court's order denying Petitioner's motion, pursuant to Rule 60(b), Fed.R.Civ.P., to set aside the judgment which had been certified and entered in accordance with Rule 54(b), Fed.R.Civ.P.[2] The judgment itself was final, but no appeal from it was ever taken. Thus, any issues concerning the merits of the 54(b) judgment (rather than collateral to it), such as the issues presented by Petitioner for review, are *not* in the court of appeals, and thus are outside the jurisdiction of this Court. *See The Boeing Company v. Van Gemert*, 444 U.S. 472, 479 n.5 (1980) (where Petitioner did not appeal an aspect of a final and appealable judgment, that issue was not considered by the Court).

The two questions which Petitioner has presented for review have a common core. They both seek an answer from this Court as to whether the judgment entered by the district court pursuant to Rule 54(b) is truly a final judgment. Those questions might have been appropriate ones for this Court to address, had the judgment itself been appealed. If it had been appealed, and if the Fifth Circuit had concluded that the judgment lacked finality, that court would have dismissed the appeal for want of jurisdiction. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 750 (1976). On the other hand, if the Court of Appeals had affirmed the judgment, this Court would have then been in a position to review the issue of finality of the judgment. *Id.*

These conditional states of affairs are irrelevant, however, because the fact is that no appeal of the underlying judgment was ever taken. Thus, no higher court—neither the court of appeals nor this Court—has ever had jurisdiction to review the judgment, or even to determine whether there

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[2]The Fifth Circuit, finding no abuse of discretion, affirmed this denial of collateral relief under 60(b).

was appellate jurisdiction to review it. Since the failure to take a timely appeal justifies dismissal of an appeal subsequently taken, *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966), *reh'g den.*, 385 U.S. 995 (1966), it follows *a fortiori* that the failure to appeal at all effectively constitutes a waiver of review as to all aspects of the judgment, including finality. Petitioner, having failed to appeal the underlying judgment, cannot now bring the question of its finality before this Court.

B. A 60(b) Motion is Not a Substitute for Appeal

Mrs. Shavers' petition for writ of certiorari purports to fault the Fifth Circuit Court of Appeals for not responding to her arguments as to the finality of the 54(b) judgment. (Petition, pp. 6, 17) Moreover, in several places, the Petitioner contends that the Fifth Circuit *affirmed* that judgment. (Petition, pp. 6, 7, 8, 14). Petitioner's position on these points reveals either a failure to understand the posture of this case or an affirmative effort to misrepresent that posture in an attempt to gain review of issues which have been waived because they were not appealed.

It is true that the court of appeals did not respond to Petitioner's arguments on finality. It is not true that the court of appeals affirmed the judgment. The reason underlying both of these facts is the same: the court of appeals had no jurisdiction, for the reasons outlined in the preceding section of this discussion, either to consider finality arguments or to affirm the underlying 54(b) judgment. The court of appeals only had jurisdiction to determine whether the district court's denial of relief under Rule 60(b) constituted an abuse of discretion, because only the Rule 60(b) order was before it on appeal. And *only* that order was affirmed.

The Court of Appeals took the proper and legal course when it ignored the issue of finality of the underlying judg-

ment in the context of the 60(b) appeal. This is so for a number of reasons. First, quite simply, the issue was not raised by Petitioner in her 60(b) motion to the district court.[3] The principle is fundamental that an issue not raised before the trial court is not preserved for review, either by the appellate court, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), or by the Supreme Court, *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Rugendorf v. United States*, 376 U.S. 528, 534 (1964), *reh'g den.*, 377 U.S. 940 (1964).

Second, even had the issue of finality been presented to the trial court in the 60(b) motion, Rule 60(b) does not contemplate review of such an issue, either by the trial court or any higher court. By its own terms, the Rule allows for collateral relief from "final" judgments.

Third, and most important to this case, is that if the court of appeals had considered and adjudicated the finality issue, it would have been overstepping the bounds of its authority, and, in effect been reviewing the underlying judgment itself. "While a 60(b) motion to set aside judgment is to be 'construed liberally to do substantial justice' [citation omitted], *it is not a substitute for appeal.*" *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977) (emphasis added). Mrs. Shavers, in her appeal to the Fifth Circuit and in her petition to this Court, has been and is attempting to contravene that principle, viz., to use her 60(b) motion and her appeal from its denial as a substitute for the appeal of the underlying judgment which she failed to take. It is well-settled that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Director,*

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[3]The motion was not specific in its terms, but purported to raise several of the grounds for relief set out in Rule 60(b), e.g., mistake, excusable neglect, invalid service of process.

Department of Corrections of Illinois, 434 U.S. 257, 263 n.7 (1978), *reh'g den.*, 434 U.S. 1089 (1978).

C. The Relation Between Rule 54(b) and 28 U.S.C. § 1292(b) is Not at Issue

Petitioner presents a question to this Court concerning the interrelation between Rule 54(b) and 28 U.S.C. § 1292(b), which provides for interlocutory appeal of certain matters. Apparently, the premise of Petitioner's argument on this point is that if the court of appeals perceived that it had jurisdiction of "the appeal" (Petition, p.22) pursuant to § 1292(b) (rather than Rule 54(b)), that would constitute an improper exercise of jurisdiction.

First, there is absolutely no indication in the record that the court of appeals assumed jurisidiction under § 1292(b). (*See* Petitioner's Appendix B.) Moreover, the argument suffers from the same misconception concerning the procedural posture of this case as has been noted above. "The appeal" to which Petitioner appears to refer is the nonexistent appeal of the underlying judgment, and the question of whether it could properly be certified as final pursuant to Rule 54(b).

Had such an appeal been taken, the tension which Petitioner proposes exists between the requirements of Rule 54(b) and those of § 1292(b) might be an issue. However, the denial of 60(b) relief is the only order from which appeal was taken, and there is no argument in the petition which purports to establish some problematic relation between appeals pursuant to denial of Rule 60(b) motions and those pursuant to § 1292(b). Every authority which Petitioner cites as support for the proposition that the court of appeals lacked jurisdiction of "the appeal", if such jurisdiction was exercised based on § 1292(b) (*see* Petition, pp. 18-24), is distinguishable from the instant case on a single ground: in

all of the cited cases, appeals were taken *directly* from either a Rule 54(b) or a § 1292(b) certification. *DeMelo v. Woolsey Marine Industries, Inc.*, 677 F.2d 1030, 1031-2, (5th Cir. 1982) (the court held it had jurisdiction to hear an appeal pursuant to § 1292(b) although certification could have been made pursuant to Rule 54(b); no Rule 60(b) motion appears to have been made); *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 739 (1976) (this Court held that court of appeals lacked jurisdiction of a *direct* appeal from a Rule 54(b) judgment because the judgment was not final; no Rule 60(b) motion appears to have been made); *Bergstrom v. Sears, Roebuck and Co.*, 599 F.2d 62, 65 (8th Cir. 1979) (the court held, on *direct* appeal of Rule 54(b) judgment, that such could serve as the equivalent of a § 1292(b) certification; no Rule 60(b) motion appears to have been made); *Morrison-Knudsen Company, Inc. v Archer*, 655 F.2d 962, 966 (9th Cir. 1981) (on *direct* appeal the court held that a 54(b) judgment is not a substitute for a § 1292(b) certification; no Rule 60(b) motion appears to have been made); *West v. Capitol Federal Savings and Loan Association*, 558 F.2d 977, 982 (10th Cir. 1977) (the court held, on *direct* appeal from a Rule 54(b) judgment, that appellate jurisdiction was absent and was not provided by § 1292(b); no Rule 60(b) motion appears to have been made); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10, 27-28 (S.D.N.Y. 1975) (trial court refused to allow § 1292(b) certification of an issue and held that such is not equivalent to Rule 54(b) certification; the court was ruling on a party's motion for § 1292(b) certification, not on a Rule 60(b) motion). In none of those cases was appeal of the primary judgment foregone and Rule 60(b) relief pursued instead, as is true in the case at bar.

The distinction is fundamental and fatal to Petitioner's argument. It serves to highlight the fact that while the

finality of a judgment, whether determined pursuant to Rule 54(b) or § 1292(b), is a proper issue in a direct appeal from such judgment, it is not an issue in an appeal from denial of a Rule 60(b) motion. Absent direct appeal the issue is waived.

II. The Default Judgment Entered by the District Court is a Final Judgment

Even if this Court should conclude it has jurisdiction to review the issues set forth by Petitioner as to the propriety of the Rule 54(b) certification of the judgment as final, such review is not warranted in this case. First, this Court has held that entry of a final judgment pursuant to Rule 54(b), and thus the timing of its release for appeal, "is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956). For this reason, the district court's decision to enter a judgment under Rule 54(b) should be afforded substantial deference. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980).

Furthermore, the judgment entered by the district court does have the requisite finality to allow it to stand against the Petitioner. It ultimately disposes of Respondent's claim for relief adjudicating both liability and damages and "leaving nothing to be done but to enforce by execution what ha[s] been determined." *Catlin v. United States*, 324 U.S. 229, 236 (1945).

The 112-year old case of *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872), relied on by Petitioner, has no applicability to this case, and cannot here stand for the proposition that the judgment against Petitioner is not final. In *Frow*, the complaint against a group of fourteen defendants alleged

they had jointly conspired to defraud the plaintiff. 82 U.S. (15 Wall.) at 554. That is all that was alleged, and that is where Frow parts company with the instant case.

Here, the Respondent's suit against the Petitioner and several other defendants alleges not only conspiracy as a potential ground for relief, but also sets forth conduct amounting to fraudulent omission and misrepresentation by the individual defendants, including Petitioner, which resulted in injury to the Respondent. (Petitioner's Appendix J.) Such conduct can certainly be engaged in by one or more defendants, without any necessity that they agree with one another as to their acts and/or their fraudulent purpose, or that they act in concert.

Moreover, since in a default judgment, all the well-pleaded allegations of the complaint are taken as true, *Thompson v. Wooster*, 114 U.S. 104, 110 (1885); *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 69 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), both the allegations as to fraud and as to conspiracy are proved with respect to the Petitioner. Thus, Petitioner's liability to Respondent is established and her liability for fraud in no way depends on the liability of others. In *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976), *cert. den.*, 434 U.S. 1014 (1978) the court noted that even in the unlikely event that *Frow* is still vital law in light of the adoption of Rule 54(b) allowing for final judgment against less than all parties in a multiple-party suit, it would only "control in situations where the liability of one defendant necessarily depends upon the liability of others." 535 F.2d 742, 746-7 n. 4. The Seventh Circuit has also construed *Frow* so as to limit it to cases where the acts complained of can only result in joint liability. *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980). Where liability would be joint and several, *Frow* is inapplicable. *Id; see Pang-Tsu-Mow v. Republic of*

China, 225 F.2d 543, 544 (D.C. Cir. 1955). In the instant case, liability *would* be joint and several since the complaint alleges both acts done in concert and acts done independently by various defendants, including the Petitioner. Her argument based on *Frow* incorrectly assumes solely joint liability and for that reason is inappropriate. Hence, while *Frow* may or may not still be good law, there is no need for the Court to decide that question in the context of this case. It is sufficient to conclude that *Frow* simply does not apply here.[4]

CONCLUSION

Throughout this lawsuit, Respondent has been subjected to the dilatory and evasive conduct of Petitioner, whom the district court found to "have engaged in a deliberate course of conduct to obstruct and impede the prosecution of this case." (Petitioner's Appendix D.) The Petition which is now before this Court is yet another link in that chain of behavior.

Respondent has a valid, final and enforceable judgment against the Petitioner, rendered with due regard for all requirements of law and of the Rules of Civil Procedure. While Petitioner now takes issue with the correctness of that judgment, she purposefully waived her right to question it before the courts when she failed to appeal it. The jurisdictional rules of our courts requiring timely appeal are not to be disregarded with impunity; they serve the vital function of "set[ting] a definite point of time when litigation shall be at an end, unless within that time the prescribed application [for review] has been made; and if it has not, to

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[4]Note also that this Court's decision in *Frow* came after the lower court had held the non-defaulting defendants not liable. Thus the decision served to vitiate actually inconsistent adjudications, rather than merely potential ones. 82 U.S. (15 Wall.) 552 (1872).

advise prospective appellees that they are freed of the appellant's demands". *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943)

Petitioner's failure to appeal the underlying judgment against her leaves her without a right to appellate review of that judgment. While this may appear harsh, it is the result of her own calculated choice to ignore the proceedings against her and then to seek relief under Rule 60(b) rather than to challenge the judgment by direct appeal. While Petitioner bemoans her lack of a day in court, she had ample opportunity to defend on the merits and failed to do so. It has already been determined that her failure to defend herself was inexcusable. Thus, Petitioner's efforts to have this Court review her assertions should not be rewarded. Most important, this Court has no jurisdiction to do so. Morever, even if jurisdiction exists, the case does not warrant review, for the reasons set forth above. Thus, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Respondent

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CERTIFICATE OF SERVICE

I, MARGARET L. VANDERVALK, counsel for Respondent, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing Brief in Opposition to Petition for Certiorari, certified mail, return receipt requested, addressed to George F. Bloss, III, attorney of record for the Petitioner, at his record mailing address of 1400 24th Avenue, Suite 301, P.O. Box 177, Gulfport, MS, 39502, being the only party required to be served on this, the ____ day of October, 1984.

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